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No. 9707

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARRIE GATES, CHARLES ELMER GATES and LLOYD GATES, by his guardian, Carrie Gates,

Appellants,

vs.

GENERAL CASUALTY COMPANY OF AMERICA (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

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JURISDICTION.

The statutory provisions which give the District Court jurisdiction of the above case are: (1) Subdivision (1) of Section 41 of Title 28 of the United States Code, which provides that the District Court shall have original jurisdiction of all suits of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and is between citizens of different states; and (2) Section 71 of Title 28 of the United States Code which provides that any suit of a civil nature, at law or in equity, in any state court, of which the

District Courts of the United States are given jurisdiction, other than those arising under the constitution or laws of the United States or treaties made, or which shall be made, under their authority, may be removed by the defendant therein to the District Court of the United States for the proper district.

The statutory provision which gives this court jurisdiction upon the appeal to review the decision in question is Subdivision (a) of Section 225 of Title 28 of the United States Code, which provides that the Circuit Courts of Appeal shall have appellate jurisdiction to review, by appeal, final decisions in the District Courts in all cases, save where a direct review of the decision may be had in the Supreme Court.

The pleadings showing jurisdiction are: (1) The Complaint (R. 2), filed in the Superior Court of the State of California, in and for the County of Fresno, which declares at law upon a policy or contract of insurance against liability for damages arising from the accident described therein and prays for a judgment in the principal sum of $5,215.03, exclusive of interest and costs; and (2) the Petition of the defendant for removal of the cause to the District Court of the United States, for the Southern District of California, Northern Division (R. 6), in which it is alleged that at the time of the commencement of the action the plaintiffs, and each of them, were citizens and residents of the State of California, and the defendant was a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

STATEMENT OF THE CASE.

This is an appeal from a judgment in favor of the defendant in an action on a public liability policy issued on the 6th day of June, 1934, for a period of time commencing on June 2, 1934, and ending on June 2, 1935. The plaintiffs are the holders of a judgment against the insured R. O. Deacon Lumber Company, a corporation, for the death of Elmer Gates in an accident which occurred on September 20, 1934. Fraudulent concealment was pleaded as a defense and the court found in substantial conformity with the affirmative allegations of the answer that, prior to the issuance and delivery of said policy, specific inquiry was made of said R. O. Deacon Lumber Company by defendant through the broker or agent for the name of its prior insurance carrier, and the number and other available information on liability and property damage claims against said R. O. Deacon Lumber Company, preceding the application for the insurance policy from defendant; that upon information furnished by said R. O. Deacon Lumber Company through its broker or agent in San Francisco to defendant, defendant issued and delivered the said policy; that in the month of October, 1934, defendant learned for the first time that the statements and information furnished by said R. O. Deacon Lumber Company, in response to defendant's specific inquiry regarding other insurance carriers and the number and other available information on liability and property damage claims against said R. O. Deacon Lumber Company, preceding said corporation's application to defendant, were incorrect and incomplete; that said R. O. Deacon

Lumber Company fraudulently misrepresented the facts to defendant and fraudulently concealed the fact that for a period of time prior to the issuance of defendant's policy, said R. O. Deacon Lumber Company was insured with the Metropolitan Casualty Company, and during said time several serious liability claims for personal injuries and a number of property damage claims were made against said R. O. Deacon Lumber Company, resulting in substantial losses to said Metropolitan Casualty Company, and had said information been furnished defendant in response to a specific inquiry prior to the issuance of said policy, defendant would not have issued or delivered said policy to said R. O. Deacon Lumber Company, and that, upon learning of said concealment of facts for which defendant made specific inquiry, and upon which it would have determined whether it would issue the policy applied for, defendant immediately rescinded said policy of insurance. (R. 20-21.)

The evidence shows that, before the policy was issued, the broker for the insured delivered to defendant a letter written to the broker by the insured in response to an inquiry made at the request of defendant. In this letter it was stated that in the latter part of September, 1933, one of the R. O. Deacon Lumber Company's trucks had an accident and was completely destroyed; that its insurance was then carried by the Maryland Casualty Company, and this loss cost them too much and they withdrew the coverage shortly after that time; that the insurance was then placed with the Madison Insurance Company of Indiana,

which had recently gone into the hands of a receiver. The letter contained the further information that the R. O. Deacon Lumber Company had one accident in December while the Madison carried the coverage, and that there was no damage to its equipment, and, so far as they could find out, only a slight damage to that of the other party. Defendant called up the local office of the Maryland Casualty Company and was informed that it had paid out on account of the R. O. Deacon Lumber Company the sum of $53.00 or thereabouts on property damage claims and nothing on public liability, for a period of three years in which it had carried the company's public liability and property damage insurance. Defendant made no inquiry regarding the accident of September, 1933, referred to in the letter, or the withdrawal of the coverage on account of excessive losses, according to the information given therein. After the death of Mr. Gates, defendant made an investigation and discovered that from November 10, 1931, to November 10, 1933, the R. O. Deacon Lumber Company was insured against public liability and property damage in the Metropolitan Casualty Company, which had paid numerous losses on the policy, including one which occurred in September, 1933. Upon the expiration of the policy in the Metropolitan Casualty Company, the insured applied for a renewal, but the application was rejected. It is admitted that defendant made no inquiry as to when the applicant was insured in the Maryland Casualty Company, and made no inquiry of any kind from the applicant between the receipt of the above mentioned letter and the issuance of the policy.

The foregoing statement sets forth the evidence in the light most favorable to the appellee, and it is the position of appellants that the findings above set forth are contrary to and unsupported by the evidence.

SPECIFICATIONS OF ERROR.

1. That the evidence is insufficient to support the finding that in the month of October, 1934, defendant learned for the first time that the statements and information furnished by the R. O. Deacon Lumber Company in response to defendant's inquiry regarding other insurance carriers and the number and other available information on liability and property damage claims against said R. O. Deacon Lumber Company, preceding said corporation's application to defendant, were incorrect and incomplete.

2. That the evidence is insufficient to support the finding that the R. O. Deacon Lumber Company fraudulently misrepresented the facts to defendant, and fraudulently concealed the fact that for a period of time prior to the issuance of defendant's policy the R. O. Deacon Lumber Company was insured with the Metropolitan Casualty Company, and that during said time several serious liability claims for personal injuries and a number of property damage claims were made against said R. O. Deacon Lumber Company, resulting in substantial losses to said Metropolitan Casualty Company.

3. That the evidence is insufficient to support the finding that, had said information been furnished de-

fendant in response to its inquiry prior to the issuance of said policy, defendant would not have issued or delivered said policy to said R. O. Deacon Lumber Company.

4. That the evidence is insufficient to support the finding that defendant rescinded said policy of insurance immediately upon learning of the facts which were found to have been concealed.

5. That the evidence is insufficient to support the conclusion of law that the defendant duly and regularly rescinded said policy of insurance and thereby said contract of insurance or indemnity was extinguished.

6. That the evidence is insufficient to support the judgment.

ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

Summary: The information furnished by the R. O. Deacon Lumber Company in response to defendant's inquiry regarding other insurance carriers and the number and other available information upon liability and property damage claims against said company preceding its application to defendant was upon its face incorrect and conflicting, and defendant was in possession of information sufficient to put a prudent person upon an inquiry, which, if pursued with reasonable diligence, would have resulted in the discovery of all of the material facts relating to the subject of the inquiry. Consequently, defendant must be charged

as a matter of law with the knowledge, as of the date of the issuance of the policy, that the statements and information furnished by the applicant in response to defendant's inquiry were incorrect and incomplete.

When an insurance company requires an applicant for insurance to answer inquiries relating to matters which it considers material to the risk, and the answers given are not responsive to the questions asked, and are, on their face, incomplete and uncertain, and the company accepts the premium and issues the policy without further inquiry, all defects in the response to the inquiries are deemed to be waived, and the insurer cannot, after a loss has occurred, be heard to claim that the facts embraced within the scope of the inquiry were not disclosed. When the company, before issuing the policy, has knowledge of facts sufficient to put a prudent person upon an inquiry, which, if pursued with reasonable diligence, would have led to the discovery of all of the material facts, it will be deemed to have issued the policy with knowledge of all of the facts that such an inquiry would have disclosed, and cannot thereafter be heard to claim that it did not discover them until after a loss had occurred.

At 32 C. J. 1343, it is said:

> "Where a question appears from the face of the application to be unanswered or imperfectly or insufficiently answered, the company by issuing its policy without further inquiry waives the imperfection and renders it immaterial."

In *Buffalo Forge Company v. Mutual Security Company,* 83 Conn. 393, 76 Atl. 995, the court quotes from Cooley on Insurance, Vol. 3, page 2634, as follows:

"The issuance of a policy on an application containing ambiguous, indefinite or imperfect answers to questions propounded therein will waive any objection to the answers on the ground of defects therein."

In *Turner v. Redwood Mutual Life Association,* 13 Cal. App. (2d) 573, 57 P. (2d) 222, a life insurance policy was issued without medical examination. The application, made in 1928, contained the following questions and answers:

"Q. From what illnesses have you suffered during the last three years?
A. Droppage of bladder (fully recovered).
Q. Have you ever had an operation?
A. Operation for small rupture in 1921."

An operation was performed on the deceased within three years before the application and it was not upon her bladder but on an organ in close proximity to it. The court said there was nothing to show that she didn't believe it was on her bladder and she gave the names of her attending physicians and defendant could have ascertained the exact nature of her illness and treatment had it sought that information before it issued its policy. At page 578 the court said:

"The illness and some treatment, though not the correct organ involved, were disclosed, and only the fact of an operation to effect a cure was withheld. As defendant made no investigation when it should and could have, and as it issued its policy of insurance, accepted Mrs. Turner's money for six years and lulled her into the secure belief that she had a valid policy of life insurance, it

must be held that it waived the misstatement in the application and is now estopped from asserting the purported fraud."

In *O'Connor v. Modern Woodmen of America,* 110 Minn. 18, 124 N. W. 454, 25 L. R. A. (N. S.) 1244, the application for insurance contained the following question and answer:

"Q. If you use intoxicants at all, state kind and quantity consumed.

A. When I come to town, beer."

It was held that the substantial fact that the applicant was in the habit of indulging in intoxicating liquors was communicated by the answer and there was no fraud or intentional concealment in failing to include whiskey. The court said:

"The answer was recorded by the Society's physician, and, if more particular information was desired, he could later have obtained it by further questions."

In *Fisher v. Missouri State Life Insurance Company,* 97 Fla. 512, 121 So. 799, assured was asked to detail all illnesses, diseases and operations he had had since childhood, giving the nature of such accidents or injuries, the date, duration, results and the names of medical attendants, and answered that he had never had a doctor in his life. Evidence showed that he had consulted a physician and had an x-ray examination and was advised to have an operation for ulcer of the stomach. The court said:

"The evidence fails to show * * * that the insured at the time of answering the questions was

conscious of any affliction or bad health at the time he signed the application.

"The insurance company had the right to require a full and complete answer to the questions propounded in the application, and if it waived the right by accepting the application containing the answers which were not responsive to the questions propounded, it could not complain that it did not receive information to which it was entitled."

In *Golding v. Modern Woodmen of America,* 213 Mo. App. 171, 250 S. W. 933, the application contained the following questions and answers:

"Q. Have you within the last five years used any medicine, or consulted or been treated by any physician or physicians, or other person in regard to personal ailment?

A. Yes.

Q. If so, give name and amount of medicine used, the names and addresses of each and all physicians or persons consulted, or by whom treated, and dates, ailments, and durations of attacks.

A. Tonsilitis for one week."

He had been treated for influenza and bronchitis and for bruises suffered in an accident. It was held that the answer, "Tonsilitis for one week" did not necessarily imply that to be the only ailment for which a physician was consulted. The court quotes from Joyce on Insurance, Section 1914 B, as follows:

"Where an answer is upon its face * * * incomplete and the insurer fails to avail itself of

its rights by making further inquiries in regard to the matter, or to do any act evidencing its dissatisfaction therewith, but on the contrary * * * issues the policy, it cannot avoid the contract, even though the answer suggests an affirmative which is false or contrary to the truth."

The court also quotes from Section 1916 of the same work as follows:

"If partial answers are made, the warranty will not be extended beyond the answer or beyond what the answer fairly imports within the ascertained intent of the parties."

In *Provident Life and Accident Insurance Company v. Ivy,* 18 Tenn. App. 106, 73 S. W. (2d) 706, the application read in part as follows:

"Q. Have you ever claimed or received indemnity for any injury or illness?

A. $400.00 T. P. A. Injury. Full recovery.

Q. Has any accident or health or life insurance company or association ever rejected or postponed your application, cancelled your policy or certificate or declined to renew the same? (If so, state what company or association did it, when and why.)

A. No."

Assured had previously had policies in three fraternal associations, had been injured and collected approximately $400.00 from each, and they all cancelled the insurance. It was held that this was not such a misrepresentation that if the company had been informed about it they would not have issued the policy. The court said:

"Failure to inform it of the other two companies did not increase the risk of loss."

It was held further that the two questions and answers thereto, taken together, were sufficient to put the company upon inquiry as to what had become of the policy mentioned in the answer to the first question.

In *Smith v. North American Accident Insurance Company,* 46 Nev. 30, 205 Pac. 801, the application contained the following question and answer:

"Q. Have you ever been ruptured or suffered the loss of a hand, foot or eye; had diabetes, kidney diseases, tuberculosis, syphilis, paralysis, varicose veins or any sickness or disorder of the brain, heart, spine or nervous system or any bodily or mental infirmity, except as herein stated?

A. Four toes left foot gone."

The evidence showed that at the time of the application the assured had tuberculosis. It was held that the company waived the incompleteness of the answer by issuing the policy without further inquiry.

In *Rabin v. Central Business Men's Association,* 116 Kan. 280, 226 Pac. 764, 38 A. L. R. 26, the application contained the following:

"Q. Have you ever made claim or received indemnity on account of any injury or illness? If so, give companies or associations, dates, amounts and causes.

A. Yes, about eight years ago; have forgotten the name of company."

The insured had, within six years, made claims for and received indemnity on account of injuries from three different companies. The court said:

> "The rule seems to be well recognized that when, upon the face of an application, a question appears not to be answered at all, or to be incompletely answered, and the insurer issues a policy without further inquiry, it waives the incompleteness of or failure to answer, as the case may be, and renders the failure to answer immaterial. (Authorities.) The court did not err in taking this defense from the jury."

At 14 *R. C. L.* 1186, it is said:

> "An insurer, by receiving an application for life insurance with questions therein contained partially answered and issuing a policy thereon thereby waives the imperfections in the answers, and renders the omission to answer more fully immaterial."

In *Allen v. Phoenix Assurance Company,* 14 Idaho 728, 95 Pac. 829, the application contained the following:

> "Q. What is your title to ground?
> A. Donated to mill.
> Q. Is property mortgaged? How much?
> No Answer."

The policy contained a provision that it should be void if the interest of the insured be other than unconditionally a sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance

be personal property and be or become encumbered by a chattel mortgage. Insured did not own the land on which the mill was situated and the personal property was mortgaged. The court said:

> "If these answers were insufficient to fully advise the company so that it could write an insurance policy or accept the risk, it was the duty of the company to require such questions to be fully and satisfactorily answered before the policy was written or delivered. The issue of a policy upon an application is a waiver of all matters of sufficiency of form or disclosures called for by the questions."

In *Peterson v. Manhattan Life Insurance Company,* 244 Ill. 329, 18 Ann. Cas. 96, 91 N. E. 466, the application contained the following:

> "Q. Give the names and addresses of physicians who have attended you or whom you have consulted during the last ten years and for what diseases.
>
> A. Has not been sick."

The evidence showed that the deceased had muscular rheumatism within the ten years past and consulted a physician at that time. The court said:

> "To say 'has not been sick' does not answer any part of the question. It may be, as suggested by defendant in error, that in view of the history of this applicant the conclusion should be that this answer was a palpable evasion, made for the purpose of avoiding a recitation of facts that that would lead to a rejection of the application for insurance. But the company did not elect to

require an answer to the question. On the contrary, it issued the policy with that evasion appearing in the medical examination. If the answer was good enough when the company desired to collect premiums from the applicant, it ought to be good enough when the company is called upon to pay. By issuing the policy the company waived any answer to this question."

In *Sterling Life Insurance Company v. Rapps,* 130 Ill. App. 121, the following question and answer were incorporated within the policy:

"Q. What is your present use of liquors and narcotics (state amount and kind used and whether daily)?

A. Drink occasionally."

The court said:

"If appellant desired any further information as to the habits of insured with respect to the use of intoxicating liquors, it should have insisted upon a full and complete answer to the question. Having failed to do so, and having issued its certificate, appellant must be held to have waived any further answer to the question. The insured gave his occupation as 'saloon keeper' and stated that he drank intoxicating liquors occasionally. This was ample notice to appellant of insured's habits in that regard, and it cannot be heard to say, in the absence of proof to the contrary, that the occasional use of intoxicating liquors was excessive, because any use of intoxicating liquor by him tended to aggravate his liver trouble and induce bilious attacks."

In *L. Black Company v. London Guarantee and Accident Company, Ltd.,* 159 N. Y. App. Div. 186, 144 N. Y. S. 424, the court quotes from Richards on Insurance Law (3rd ed.), Section 113 as follows:

> "If a question in the application is not answered at all, or if the answer is not false in any respect but upon its face is only incomplete, there is no breach of warranty, provided the insurer accepts the application without objection, since, if not satisfied, the company should demand fuller information. So also, to avoid forfeiture, equivocal answers are construed most strongly against the company, but, notwithstanding this, the applicant must answer in good faith and not attempt to evade, conceal or mislead."

In *Gates v. Madison County Insurance Company,* 5 N. Y. 469, it was held that the applicant for insurance against fire, in the absence of any special provisions, is only required to answer fully and in good faith, all inquiries addressed to him on the subject, and not to misrepresent or designedly conceal any facts material to the risk. The policy contained the following:

> "Q. How bounded, and the distance from other buildings, if less than ten rods.
>
> A. The nearest building east is the dwelling house occupied by Charles Eggleston, which is about 48 feet; on the north, and about five rods distance, is a shop * * *, and on the west, the nearest building to the west end of the barn and shed, is the dwelling house occupied by Benjamin Fraser, which is about 14 feet distance, * * *."

There were other buildings within the distance of ten rods which were not mentioned. It was held that the omission to mention the other buildings did not amount to a concealment, fatal to the contract, even though they were hazardous.

In *Carson v. Jersey City Insurance Company,* 43 N. J. L. (14 Vroom) 300, the following was incorporated in the policy:

> "Q. Is there any encumbrance on the property?
>
> A. Expects to borrow $3000.00 and use the policy as collateral.
>
> Q. If mortgaged, state the amount.
>
> No answer."

There were four mortgages on the property. By the provisions of the policy the answers to the questions were made warranties, but it was held that there was no warranty as to encumbrances. The court said:

> "If the applicant had falsely answered the inquiries propounded with respect to encumbrances, the policy would be avoided for breach of a condition of insurance. But he studiously refrained from making any answers to the inquiry on the subject. The paper was incomplete in that respect.
>
> "* * * When a policy is issued on a written application for insurance, and any of the questions are left unanswered, the objection must be made before the policy is issued. A policy issued upon such an application is a waiver of the right to the information called for by the inquiry unanswered, and the contract of insurance will be considered as based only on the answers given to

inquiries to which the applicant has responded. If the insurer issues a policy upon an uncompleted application for the insurance, he cannot afterwards avoid the policy on the ground that the answers were not full."

In *Coleman Mutual Aid Association v. Clark* (Tex.), 63 S. W. (2d) 270, it is held that statements in an application which are sufficient to put the insurers upon an inquiry furnish them with notice of such facts as they might be presumed to learn on reasonable inquiry.

At 20 *R. C. L.* 346 it is said:

"Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice; he does wrong not to heed the 'signs and signals' seen by him. It will not do to remain wilfully ignorant of a thing readily ascertainable. It has been said that want of actual knowledge in such a case is a species of fraud. The rule has sometimes been said to be that whatever puts a person on inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, and would lead to the knowledge of the requisite fact by the exercise

of ordinary diligence and understanding. It has also been said that wherever inquiry is a duty, the person bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. The latter statements, however, do not vary the general rule by imposing a duty to make inquiry as an element of notice, for when one has actual knowledge of such facts as would put a prudent man on inquiry, it becomes his duty to make inquiry, and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received if he had made the inquiry."

In *E. A. Boyd Co. v. U. S. Fidelity & Guaranty Company,* 35 Cal. App. (2d) 171, 94 Pac. (2d) 1046, the defendant bonding company was held estopped to set up as a defense the failure of the plaintiff, in applying for a bond for an employee, to disclose the fact of the employee's previous defalcation, for the reason that defendant had sufficient information at the time of issuing the policy to place a reasonably prudent person on inquiry.

The inquiry which the court found to have been addressed by the defendant to R. O. Deacon Lumber Company calls specifically for the name of the applicant's prior insurance carrier. It also called for the number and other available information on lia-

bility and property damage claims against the applicant preceding the application. The inquiry was found by the court to have been made through the broker, and the evidence shows that the answer was given in certain statements made by the broker to defendants' agents, and in a letter from the applicant to the broker, which the broker in turn delivered to defendant. Ben C. Sturges, assistant manager of defendant, testified that the broker told him that the previous carriers were the Maryland Casualty Company and the Madison-Chicago, which had recently retired from the state, that the Maryland had had a satisfactory record, the total claim payments being something like $58.00, that the Madison had had only some trivial claims, not involving any personal injuries, and no accident frequency beyond the normal expectancy, and that the broker claimed that the two companies covered the period of several years. (R. 27.) On cross-examination the witness admitted that the broker told him that he would secure further information from the Deacon Lumber Company and submit it to defendant's office, and that he then submitted the letter designated as Plaintiff's Exhibit 2, along with other information. (R. 33.)

The letter was dated May 5, 1934, and the material portions read as follows:

> "The latter part of September, 1933, one of our trucks had an accident and was completely destroyed. Our insurance was then carried by the Maryland Casualty and this loss cost them too much and they withdrew the coverage shortly

> after that time. We then placed the insurance through a local agency with the Madison Insurance Company of Indiana. This company recently went through receivership and our insurance is of no value. * * *
>
> "We had one accident of small consequence at Turlock in December during the time Madison carried the coverage. We have not yet been able to find out whether the loss was settled before they failed. There was no damage to our equipment and so far as we could find out only slight damage to that of the other party."

The witness testified that he had no conversation with Mr. Drenth in reference to the subject matter of the letter; that the letter was in the office; that Mr. Drenth delivered it to the office and the witness read it afterwards, but not while Mr. Drenth was there; that he did not personally, after reading the letter, call Mr. Drenth and discuss it with him; that he had Mr. Haney do it, and then they issued the policy; that he did not have any of their Fresno agents check up on the information contained in the letter. (R. 35.) He further testified that he recalled only two conversations that he had with Mr. Drenth in reference to this insurance; that the second conversation took place probably a week or ten days after he originally discussed the matter with him; that he had the first conversation with him previous to May 5; that the second conversation was sometime subsequent to that date; that he did not recall just how many days; that he would judge within a week. (R. 36.) His version of the second conversation was as follows:

> "Well, he stated that he had secured the information from the Deacon Lumber Company, had submitted it to our office, and he stated that the Maryland Casualty Company had had one claim, and small claims in the Madison. That is all I recall was discussed."

He testified that there was no further discussion because it had been submitted to their underwriting department; that he told Mr. Drenth that the underwriting department would review the matter and then if they reported favorably, the policy would be issued; that the list of cars included in the fleet, together with the several coverages were submitted to Mr. Haney; that he is the chief underwriter in the office and the correspondence which Mr. Drenth stated that he had received was turned into defendant's office so that the two matters were at that time to have consideration. (R. 37.) The witness said that in his first conversation with Mr. Drenth the latter stated that he understood the line was satisfactory, and that it had been represented to him as such, and it was at that time that he told Mr. Drenth that before they could entertain it, they must have the previous carrier's experience in relation to claim experience; that Mr. Drenth stated that he would secure the information from his clients in due time. (R. 38.)

Mr. Haney testified that Mr. Drenth spoke to him personally and told him that he understood the experience was good, and said that he would get the accurate information as to the exact experience on that line; that he saw him after that time and had a con-

versation with him about it; that the second conversation brought out that the Maryland Casualty Company had been on the line, and had a small amount of losses, somewhere around $50.00 or $53.00 in property damage, and no public liability losses; that they had their insurance for a short time in the Madison; that their losses there were very small; and that their insurance was useless because the Madison had retired. (R. 40.) He identified a paper which he said Mr. Drenth had given him on which were written the words "Maryland" and "No losses. P. D. claims amounted to only $53.00 in three years". (R. 41.) The witness further testified that he did not see the letter marked Plaintiff's Exhibit 2, and in his conversation with Mr. Drenth, he asked him the names of the insurance carriers of the R. O. Deacon Lumber Company; that the names given were Maryland Casualty Company, and the Madison, and that in acting in this manner, he relied upon the statements made by Mr. Drenth to him. (R. 44.) Upon cross-examination he testified that his first conversation with Mr. Drenth was in the early part of May, and that he had another conversation with him which took place around the first couple of days in June. At that time Mr. Drenth came in with a list of the equipment and with the information that the Maryland Casualty Company and the Madison had been (R. 45) on the line. With the information as given him by Mr. Drenth and having one of the girls check with the Maryland Casualty Company to see that the report was correct as far as the Maryland was concerned, and deciding that they

could not check with the Madison because it had withdrawn from the state, he took Mr. Drenth's word for the accuracy of the experience and accepted the line without any other inquiry. When they checked with the Maryland, that company gave them an experience of around $53.00 or $54.00 in property damage and no public liability. That was all they were interested in because they were only writing public liability and property damage. The witness did not ask the Maryland Casualty Company about one of the trucks of the Deacon Lumber Company being completely destroyed, nor did anyone under him ask them. No one under him within his knowledge called up R. O. Deacon and asked him about that. He did not make any inquiry from Mr. John Drenth in reference to the Maryland Casualty Company not having a record of a complete loss of a truck. He asked him for the experience of the Maryland Casualty Company (R. 46) which he gave. The witness further testified that he did not inquire of the Maryland Casualty Company if they had ever cancelled the policy for the R. O. Deacon Lumber Company. He just simply asked them if they had a loss of $58.00; that is all he asked them. (R. 47.) Mr. Drenth testified that a collision insurance policy would not be placed with the Maryland Casualty because they were not writing collision on trucks (R. 72); that the Maryland Casualty Company is an indemnity company and writes liability and property damage coverage, and that fire and theft and collision is placed in another company. (R. 78.)

The inquiry addressed to the R. O. Deacon Lumber Company by defendant was entirely indefinite as to the period of time to be covered by the report, and was indefinite as to the particulars to be given, except as to the number of claims. A statement that a particular loss occurred at a given time does not constitute a representation that it was the only loss which occurred during the existence of the corporation, or during any particular period of time. The inquiry did not call for the name of any insurance carrier, except the last one, which was fully answered by giving the name of the Madison. According to the authorities hereinabove cited, if the defendant desired any more definite information than that afforded by the reply which it received, it should have made such further inquiry as would have been sufficient to elicit the necessary information. In the absence of such further inquiry, the applicant is not bound to make any further disclosure. The information that another company withdrew the coverage on account of excessive losses was sufficient to lead any prudent insurance company to reject the risk, unless by investigation it should be ascertained that the other company's refusal was unjustified.

After it had been ascertained by inquiry at the office of the Maryland Casualty Company that the losses paid by that company amounted to $53.00 on property damage claims and nothing on public liability, common prudence, in the light of the information contained in Mr. Deacon's letter, would have suggested the further question whether or not that

company was carrying the insurance in September, 1933. That inquiry would have disclosed the fact that the Maryland Company was not carrying the insurance at that time, and Mr. Deacon could then have been given an opportunity to correct his mistake in the name of the company to which he referred in his letter. Even in the absence of further inquiry from the Maryland, it was evident that the fact that the company had suffered losses of only $53.00 was inconsistent with the statement that it had refused further coverage on account of a heavy loss. Ordinary prudence required that the discrepancy be called to the attention of Mr. Deacon, and that he be required to explain it before the policy was issued. Mr. Haney testified that he never saw the letter, but that was not the fault of the insured. The broker could do no more than deliver the letter to a duly authorized agent of the company, who participated in the negotiations, and his principal cannot be charged with failure to disclose the facts revealed by its contents, due to the fact that they were never brought to the attention of the agent who made the investigation. Information imparted to one agent of a company in dealing with the insured may be imputed to the company and to another agent participating in those dealings, though in fact the second agent is ignorant of the information imparted to the first. (*Lewis v. Guardian Fire & Life Assurance Co.,* 181 N. Y. 392, 74 N. E. 224; *E. A. Boyd Co. v. U. S. Fidelity & Guaranty Co.,* 35 Cal. App. (2d) 171, 94 Pac. (2d) 1046.)

For the foregoing reasons knowledge of all of the facts which defendant subsequently learned by inquiry from the Metropolitan Casualty Company must be imputed to defendant as of the date of the issuance of the policy.

SPECIFICATION OF ERROR NO. 2.

Summary: The evidence shows that the R. O. Deacon Lumber Company did not make any false statements as to any material fact and further shows that said insured, in good faith, disclosed sufficient facts to enable defendant to determine the acceptability of the risk. Consequently, the finding of intent to deceive, which is implied in the finding of fraud, is not supported by the evidence.

One of the essential elements of fraud, whether it consists in representation or concealment, is the intent to deceive. At 29 *Am. Juris.* 422, it is said:

> "A misrepresentation in insurance is a statement as a fact of something which is untrue, and which the insured states with the knowledge that it is untrue and with an intent to deceive, or which he states positively as true without knowing it to be be true, and which has a tendency to mislead, where such fact in either case is material to the risk."

In this case there is no evidence to support the conclusion of intent to deceive on the part of the R. O. Deacon Lumber Company. The record shows no misrepresentation of any material fact and no failure

to disclose anything which Mr. Deacon had any reason to believe to be material to the risk. He frankly stated the principal fact material to the risk, that he had been refused insurance on account of a bad record of losses, and there was nothing in defendant's inquiry to put him on notice as to what particular details of that loss record defendant considered material. The number of losses involved could only be material in relation to the period of time in which they occurred, and there was no period of time mentioned in the inquiry. Aside from the number of claims, the request was only for "available information". In the absence of any further inquiry, he had the right to believe that defendant was satisfied with the information given. The answer implied no representation that the loss mentioned was the only one which the applicant ever sustained, nor does the statement that the Maryland Casualty Company was carrying the insurance at that time imply that it was the only company which ever carried applicant's insurance. The name of the company which paid the loss and cancelled the insurance was not a matter material to the risk. Its only use to defendant was to facilitate investigation. If no inquiry was made of the company named, the error was harmless. If such inquiry was made, the answer could only be that the company had suffered no such loss and was not carrying the insurance at that time. That, at most, would only have put defendant to the trouble of calling applicant's attention to the error and insisting that the name of the right company be given. From the fore-

going facts, which are the only material facts established by the evidence, it is impossible for a reasonable mind to draw the inference of intent to defraud.

SPECIFICATION OF ERROR NO. 3.

Summary: Appellee is in no position to claim that, if it had been informed of the claims made against the Metropolitan Casualty Company, it would not have issued the policy to the R. O. Deacon Lumber Company, since it had information that said insured had been refused insurance on account of excessive losses, and, knowing that it had no detailed information of any kind concerning the loss experience which led to the refusal, it failed to make any effort to secure such information.

It is an essential element of either a cause of action or a defense based upon misrepresentation or concealment that the party setting up the claim of fraud must have relied upon the representations in the one case, or relied upon the other party to disclose the facts claimed to have been concealed, in the other, and, further, that he must have been induced thereby to enter into the contract. At 23 *Am. Juris.* 939, it is said:

> "It is a fundamental principle of law of fraud, regardless of the form of relief sought, that in order to secure redress, the representee must have relied upon the statement or representation as an inducement to his action or injurious change of position. Moreover, the representation must be

> the proximate cause of such action or change of position; that is, it must have been acted upon in the manner contemplated by the party making it or else in some manner reasonably probable."

Certainly Mr. Deacon could never have contemplated as reasonably probable that defendant would ascertain the loss record of the Maryland Casualty Company and issue a policy in reliance upon that, to the exclusion of the other information given in his letter. Nor could he have reasonably contemplated that defendant would be led to ignore the information that he had been refused insurance on account of losses, by his failure to give the details of the losses. At 23 *Am. Juris.* 947, it is said:

> "The principle is well established that in order to secure relief on the ground of fraud, the complainant must have had, under the circumstances of the case, a right to rely upon the misrepresentation which is sought to be made the basis of the charge of fraud. The representation must have been made to him either directly or indirectly and must have been of such a nature that it was reasonably calculated to deceive him and to induce him to do that which otherwise he would not have done."

Defendant could not reasonably have been deceived or induced to enter into the contract of insurance by reason of the failure of insured to disclose the number and other details of the claims made against the Metropolitan Casualty Company upon the prior insurance. It was fully informed of the fact that the applicant had a loss record which had led to a rejec-

tion of the risk by another company. No insurance company, with that information in its possession, would issue the policy merely because it had not been furnished with a detailed history of the losses. Any underwriter having possession of his faculties would, if he were not entirely indifferent to the matter of previous experience, either reject the application or make an investigation to find out if the other company's rejection was justified. Having pursued the investigation no further than to ascertain that the experience of the Maryland Casualty Company had been satisfactory, defendant must be deemed to have been satisfied to issue the policy in reliance upon that experience, regardless of the probability that Mr. Deacon had been mistaken in the name of the company, which had the experience described in the letter. This conclusion may seem artificial, in view of Mr. Haney's testimony that he did not see the letter, but it is unavoidable as a matter of law, because the corporate principal is in law a single individual, and cannot split its personality to avoid the consequences of failure of two of its agents to cooperate, when such failure has led to a situation in which either the corporation or an innocent party must suffer loss.

SPECIFICATION OF ERROR NO. 4.

Under the head of Specification of Error No. 1, we have presented our argument in support of the view that appellee must be charged with knowledge, as of the time of issuing the policy, of the facts which

the Court found to have been concealed. Therefore, it cannot be heard to claim that it rescinded the policy immediately upon learning of those facts.

SPECIFICATION OF ERROR NO. 5.

The evidence fails to support the conclusion that the policy was extinguished by a due and legal rescission because, as hereinbefore pointed out, it fails to show either a legal ground for rescission, or that a timely notice was given.

SPECIFICATION OF ERROR NO. 6.

For the foregoing reasons, and for the reason that the findings upon all other points were in favor of appellants, the evidence is insufficient to support the judgment.

For the foregoing reasons, the judgment should be reversed.

Dated, Fresno, California,
February 24, 1941.

Respectfully submitted,
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